In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1489

PLASTILINE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not yet reported. The Board's decision and order (Pet. App. 4-38) are reported at 190 NLRB No. 75.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1972 (Pet. App. 1), and a petition

for rehearing was denied on March 21, 1972 (Pet. App. 39). The petition for a writ of certiorari was filed on May 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the company refused to bargain with the union after the expiration of the certification year because it desired to avoid further dealings with the union rather than because of a reasonable doubt concerning the union's continuing majority status.

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at notes 3 and 4, pp. 4-5, of the petition.

STATEMENT

A. The Board's Findings of Fact

On May 13, 1969, the Board certified Broward County Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the bargaining agent for petitioner Company's employees (Pet. App. 10). Between June and December 1969, Company and Union representatives met on thirteen occasions and ultimately reached agreement on the terms of a proposed contract (Pet. App. 23; A.

249).[1] The unit employees, however, rejected the contract on April 12, 1970.

The following day, Union President Goode informed Walter Jones, the Company's Director of Industrial Relations, of the rejection and requested a meeting with Company representatives to discuss the employees' objections to the contract (Pet. App. 23; A. 30, 156). On April 14, Jones told the Union's International Representative that he had requested Goode to present an agenda of the subjects to be discussed at a meeting and, if this was satisfactory with Company management, a meeting would be arranged (Pet. App. 23; A. 81-83). Jones added that "this was not to be construed as a negotiating meeting" (Pet. App. 23; A. 83).

On April 17, Company and Union representatives met and discussed the items on the Union's agenda (Pet. App. 24; A. 3, 33-35, 149, 216-217). At the end of the meeting, Company President Batzer stated that the Company would respond to the Union's objections to the proposed contract after consulting counsel (Pet. App. 24; A. 87-217). Despite repeated requests, the Company did not respond (Pet. App. 24; A. 89-90, 237-247).

On May 25, 1970—twelve days after the expiration of the certification year—the Company's attorney advised the Union's attorney that he had learned only that day of the employees' rejection of the contract.

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[1] "A." and "S.A." refer to the appendix and supplemental appendix, respectively, filed in the court below.

He indicated that the Company contemplated making changes in the employees' wages, hours, and employment conditions, but, before doing so, it wanted to know if the Union still represented the employees (Pet. App. 25; A. 23, 42-49). On June 1, the Union responded that it did, and requested a bargaining session on June 23 (Pet. App. 25; A. 235). The Company agreed to meet on that date, but questioned the Union's majority status and requested the presentation of proof at the meeting (Pet. App. 25-26; A. 78, 236).

The Company refused at the meeting on June 23 to bargain about its two proposed changes in working conditions unless the Union proved its majority status or would agree to do so in the near future (Pet. App. 26; A. 51-52). The Union replied that the Company was bound by the Board certification, declined to furnish fresh proof of majority status, and insisted upon bargaining (Pet. App. 26; A. 52-53). The Company stated that the meeting's sole purpose was to discuss the proposed changes and refused to bargain or to set a date for a further meeting (Pet. App. 26; A. 258-265, 275-278), asserting that it had evidence that the Union no longer had majority support (Pet. App. 26; A. 256, 259, 273).

Thereafter, the Company informed the Union that it intended to file an election petition with the Board, but offered to continue bargaining if the Union showed that it had majority support (Pet. App. 28; A. 237-247). The Union replied that no proof was necessary

in view of the certification (Pet. App. 28; S.A. 238).[2] No further bargaining occurred (Pet. App. 28; A. 239-247). In its correspondence with Union representatives, the Company ignored the Union President's repeated requests for the Company's position on contract issues, suggesting that he was not an authorized spokesman for the Union (Pet. App. 31-33; A. 239-247).

In June, July, and August 1970, the Company attempted to undermine the Union's position. It urged two leading members to persuade fellow employees to reject the Union, to support a decertification petition, and to accept an oral agreement with a Company union (Pet. App. 26-27; A. 23-28, 40-45), and offered them benefits for their aid (Pet. App. 27; 44-45, 13-16). The Company told one employee that the Union was to blame for the failure of the employees to receive certain benefits (Pet. App. 27; A. 28).

B. The Decisions Below

The Board concluded that the Company had deliberately delayed resolution of the dispute concerning a contract until after the certification year had expired. It ruled that the Company's subsequent challenge to the Union's majority status was not asserted in good faith, but instead was for the purpose of avoiding further bargaining with the Union, and

[2] The Company filed a petition on July 23, 1970 (Pet. App. 28; A. 280), which was suspended when the present unfair labor practice proceeding began (Pet. 4).

thus it violated Section 8(a)(5) and (1) of the Act (Pet. App. 34-35). The Board further held that the Company violated Section 8(a)(1) by its efforts to undermine employee support for the Union (Pet. App. 36). It ordered the Company, *inter alia*, to bargain with the Union upon request (Pet. App. 5-6, 37-38). The court of appeals enforced the order (Pet. App. 1-3).

ARGUMENT

The question stated by petitioner—whether an employer violates the Act by refusing to bargain with a union after expiration of the certification year on the basis of a reasonable doubt that the union still represents a majority of the employees—is not presented on this record. The Board found that the Company's doubt regarding the Union's majority status was not asserted in good faith, but was "part and parcel of the [Company's] scheme to avoid further bargaining with the Union" (Pet. App. 34). The court of appeals correctly concluded that "the Board's findings * * * [have] substantial support" (Pet. App. 3). The evidentiary issue thus presented does not warrant further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Moreover, the evidence summarized above amply supports the Board's finding. The Company insisted that the meeting on April 17, 1970, was not an "official" negotiating session. After that meeting, the Company promised to consult its attorney and report to the Union, but, in spite of repeated requests by the

Union, it never did so. Instead, immediately following the expiration of the certification year, the Company challenged the Union's right to represent the employees (Pet. App. 25-26; A. 78, 235-247), and insisted that the Union demonstrate majority status before it would pursue negotiations. At the same time it refused to acknowledge the Union negotiators as authorized representatives and sought to persuade key employees to abandon the Union. These facts justified the Board's conclusion concerning the Company's motive in refusing to bargain.

Contrary to petitioner's assertions (Pet. 6-7), the decision below does not conflict with *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, or *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. Although, as petitioner points out, the Court in *Brooks* indicated that an employer may refuse to bargain with an incumbent union after expiration of the certification year if it has "fair doubts" of the union's status (348 U.S. at 104), in this case the Company's expressions of doubt were not "fair" but rather were part of an unlawful scheme to eliminate a union which it disfavored. The issue in *Gissel* was "whether a union can establish a bargaining obligation by means other than a Board election" (395 U.S. at 595); the Court held that in that situation authorization cards could be relied upon to support a bargaining order if the employer had engaged in unfair labor practices which tended to preclude the holding of a fair election, and indicated that for that purpose an employer's good faith doubt

was largely irrelevant (*id.* at 614). Nothing in *Gissel* suggests that it is unnecessary to establish a good faith doubt regarding the union's continued majority before an employer may properly terminate a bargaining relationship certified by the Board.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1972.

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[8] Nor does the decision below, as petitioner asserts (Pet. 14-15), conflict with *Lodges 1746 and 743, Int'l Ass'n of Machinists* v. *National Labor Relations Board*, 416 F. 2d 809 (C.A. D.C.), certiorari denied, 396 U.S. 1058. In that case, the court denied enforcement of the bargaining order because, in its view, the employer had valid grounds for questioning the union's majority status following expiration of the certification year. The court expressly noted that there was no "independent unfair labor practice or other conduct aimed at causing disaffection from the unions" (416 F. 2d at 814). As shown, such conduct was present here.

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